82-2069

No. ——

IN THE

Supreme Court of the United States

October Term, 1982

ROGER ALAN COX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1) In a prosecution for making false statements against the United States based on the description of certain firearms imported from Guatemala as "1938 Guatamalan" light machine guns where the prosecution claimed the guns were in fact of Russian origin; and where the only evidence of that was the testimony of a non-expert that the guns "appeared" to be of Russian origin but could have been manufactured anywhere; was the evidence sufficient to support the convictions?

2) In a prosecution for making false statements against the United States, where the jury instructions confused the elements of falsity in fact (objective falsity) and the Petitioner's

belief that his statements were false (subjective falsity) and where, in response to an inquiry by the jury, the trial court instructed that the jury need only find that Petitioner believed his statements to be false when made in order to convict, can the convictions stand?

3) In a prosecution for making false statements against the United States, where there was no evidence to establish materiality of the false statements, can the convictions stand?

4) In a prosecution for making false statements against the United States, is materiality a question for determination by the court, as some Circuits hold, or is it a question which must be submitted to and decided by the jury, as is the rule in other Circuits?

5) Does 26 U.S.C. § 5848 which was enacted to preserve the Fifth Amendment right against self-incrimination bar prosecution for conspiracy to import weapons contrary to law and concealment of weapons imported contrary to law where the claim that the weapons were imported contrary to law was based on documents required to be kept by federal statute?

6) Was Petitioner deprived of a fair trial by the trial court's instructions to the jury regarding the penalty which could be imposed upon conviction?

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The district court rendered no written decision. The opinion of the Court of Appeals for the Eleventh Circuit is reported at F.2d (11th Cir. 1983), and is reprinted in the Appendix at A-3.

JURISDICTION

The judgment of the Court of Appeals is dated January 31, 1983. On April 18, 1983, the Court of Appeals denied a petition for rehearing. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 371 (1976) (Conspiracy to commit offense or to defraud United States) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 545 (1976) (Smuggling goods into the United States) provides:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law --

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

18 U.S.C. § 1001 (1976) (Statements and entries generally) provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,00 or imprisoned not more than five years, or both.

26 U.S.C. § 5848 (1976) (Restrictive use of information) provides:

> (a) General rule. -- No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence.

(b) Furnishing false information -- Subsection (a) of this section shall not preclude the use of any such information or evidence in a prosecution or other action under any applicable provision of law with respect to the furnishing of false information.

INTRODUCTION

The owner of a reputable firearms company, which supplies weapons to police departments, faces a substantial sentence of imprisonment for making a statement which was not proven to be false, but which the government claims he <u>believed</u> was false. The entire case against this respected businessman, who has never been in trouble, rests on a single alleged misstatement made on forms relating to one acquisition out of numerous he made yearly and one in which he had little direct personal involvement. Asked to identify the "manufacturer (if known)" of certain firearms purchased from the Ministry of Defense of the Republic of Guatamala, he answered "Guatamalan."

The government originally claimed it could prove that the guns were, in fact, manufactured in the Soviet Union, rather than in Guatamala. At trial, however, the government was unable to

prove where the guns were manufactured. The trial court instructed the jury that it did not matter whether the guns were manufactured in the Soviet Union (or anywhere else, for that matter), so long as the defendant <u>believed</u> they were not manufactured in Guatamala.

Indeed, the trial court excluded testimony by defendant's expert witness-- a former CIA agent -- that the guns were remanufactured in the United States and their markings modified to obfuscate and mislead. The Court of Appeals, in affirming the resulting convictions, ignored Petitioner's claim that the government had failed to prove where the guns were manufactured.

On the basis of conflicting evidence as to whether the Petitioner believed or did not believe that the guns were manufactured in Guatamala, Petitioner

stands convicted on 12 separate charges.*

In affirming these convictions, the Court of Appeals erred in several substantial ways. A statutory bar to prosecution was ignored and the jury was improperly advised about the possible scope of punishment. The Court of Appeals also failed to address an important conflict among the Circuits, namely whether the trial court correctly ruled -- without submitting the issue to the jury -- that the statement was material. This was erroneous for three reasons: 1) the issue of materiality must -- as several Circuits hold -- be submitted to the jury; 2) a statement may not be material -- as that concept is used in the perjury context-- unless it is proved to be false in fact; and 3) the government failed to prove that the statement was material, since the actual place of manufacture of

* Petitioner firmly maintained that he believed the guns were manufactured in Guatemala.

these old guns was never shown to be relevant to the decision of the Bureau of Alcohol, Tobacco and Firearms to admit them into the country.

Statement of the Case

Petitioner Roger Alan Cox, a federally licensed firearms dealer, owned the Law Enforcement Ordnance Company, which supplied police equipment and firearms to police departments throughout the United States (Vol. II, 258)* He was an expert on certain firearms and their history and had written a book on the history of the Thompson submachine gun. He was indicted in a 12-count indictment on charges arising out of his openly importing into the United States certain collector firearms which he allegedly mislabeled in terms of their country of original manufacture. He described the guns which were imported from Guatamala as

* All references are to the trial transcript.

"Model 1938 Guatamalan light machine guns." The Government charged that the vintage guns were "in truth and in fact" manufactured in the Soviet Union. Count 1 charged that he had conspired with Edward Faust to import and to sell the guns, contrary to law, in violation of 18 U.S.C. § 545. Counts 2 through 10 charged that he misdescribed the origin of the firearms, calling them Guatamalan when they were in fact Russian "DP" or "Degtyarev" light machine guns, on four forms required to be filled out in connection with the release of the weapons and parts from the foreign trade zone in San Francisco, on three forms relating to the transfer of three weapons which he sold to dealer-collectors, and in records kept at his place of business, all in violation of 18 U.S.C. § 1001. Counts 11 and 12 charged him with concealment of Russian Degtyarev "DP" light machine guns, falsely described as Guatamalan, imported

contrary to law, in violation of 18 U.S.C. § 545.

That the subject firearms were of Russian design was undisputed; that they had in fact been manufactured in Russia, was, however, in dispute. In fact, although the jury never heard the relevant testimony, these guns were "remanufactured" in the United States by the CIA which had tampered with their markings in order to obfuscate their origins. (Vol. III, 88)

A jury convicted the Petitioner on every count. Consecutive five-year sentences were imposed on each count. All but two consecutive periods of incarceration of six months were suspended, pending a five-year period of probation. The counts on which sentence was suspended and those on which incarceration was imposed were not specified.

The facts underlying the charges are, for the most part, not in dispute. In late 1977, Petitioner met Donald J. Martin, a Miami gun dealer with a supply source in Guatamala. In June of 1978, Petitioner traveled to Guatamala to purchase certain firearms which are unrelated to this case. During that trip, Petitioner was shown an example of each type of firearm available for purchase, including a light machine gun of Russian design. Thereafter, Petitioner introduced Martin to Edward Faust, a California munitions dealer charged as a co-conspirator in Count 1 of the indictment, who purchased a quantity of guns through Martin. In May of 1979, Petitioner, Faust and Martin went to Guatamala where the transaction was consummated. Pursuant to the transaction, approximately 5,000 weapons were purchased by Faust and shipped to the United States from Guatamala. In exchange for

introducing Faust to Martin, arranging the transaction and packing up the weapons, Petitioner was promised an option to purchase certain of the weapons at specified, attractive prices. The machine guns and machine gun parts which are the subject of the indictment were part of that shipment.

By pre-trial motion, Petitioner moved to dismiss Counts 1, 11 and 12 of the indictment on the ground that 26 U.S.C. § 5848, the statute adopted to guarantee the Fifth Amendment right against self-incrimination, barred prosecution on those counts. That motion was denied.

The government's proofs consisted essentially of the introduction of the documents containing the allegedly false statements, the firearms themselves, testimony that the Petitioner had described the guns as Russian, DP's, or Degtyarevs in communications with others,

and the testimony of a collector dealer to whom Petitioner had sold two of the guns that the guns he had purchased "appeared" to be of Russian origin.

At the end of the government's case, Petitioner moved for a directed verdict of acquittal on the ground that the prosecution had failed to prove that the guns were Russian in origin. Because the government's theory as to falsity was that the guns were in fact manufactured in the Soviet Union, the failure of proof meant that an essential element of the crime of false statements -- that the statement in fact be false -- was unproved. Petitioner also argued that a second essential element -- the materiality of the allegedly false statement -- had not been proved. In addition, he argued that, because the conspiracy and concealment counts were premised on the unlawfulness of the importation because the importation was

accomplished through false statements, those counts must fall as well. The motion was denied.

Petitioner testified in his own behalf. He testified that he was not an expert on communist bloc firearms and that, in his discusssions with Martin, Martin mentioned that the guns, because of their markings and appearance, did not appear to be of Soviet origin. Martin told him that as far as he knew they were made in Guatamala or were maybe "some of the U. S. junk that was shipped down here in 1954." (Vol. II, 265-66)

Cox testified that the letters "MAS" written in non-Cyrillic letters, were on the forward part of the receiver of the weapon he had examined and that he had never seen such markings on a gun from the Soviet Union (Vol. II, 266). According to Cox, Faust had also stated that the guns were of Guatamalan manufacture (Vol. II, 274). Cox testified directly that he

believed the firearms were made in Guatamala because that is what Martin had told him and he (Cox) had good technical reasons for believing so (Vol. II, 275). He believed it was a copy manufactured in Guatamala of the Russian Degtyarev DP (Vol. II, 281). Its finish and the shape of its barrel were different from a Russian DP which he had previously owned (Vol. II, 283).

On cross-examination, asked at what point in time it was decided to call the guns Guatamalan Model 1938, he testified

> [I]n describing any firearm you have to put down to the best of your knowledge and belief the best possible, most accurate and reasonable description of the firearms.... You have to call it something and there's sometimes a dispute as to what it is so you have to put down to the best of your knowledge what it is. There is no model designation on these guns. It doesn't say this is a Model DP or a Model Guatamalan 1938. The date on the gun I had an opportunity to examine was 1938. It is common practice in the firearms business and by people who write textbooks on firearms to refer to a gun by the year on most

> examples of the firearm as a model for it .... It wasn't readily apparent who made the gun on the outside of the gun. I just had to reach a conclusion -- actually Mr. Martin reached the conclusion for me, but I went along with his conclusion. It seemed reasonable to me. (Vol. II, 346-347).

Petitioner sought to introduce the testimony of one George Fassnacht, a forensic firearms expert and former CIA agent, who would have testified as an expert and from personal knowledge that the weapons at issue were "remanufactured" in the United States from battlefield scrap collected in Korea with whole subassembly parts fabricated or obtained elsewhere (Vol. III, 83) Such weapons were shipped from the United States to Guatamala in 1954 in a covert operation designed to supply arms to Guatamalan rebels engaged in the attempted, and ultimately successful, overthrow of the Communist regime there. He would have testified that spurious markings were placed on the remanufactured guns to

conceal the true origin of the weapons and to deceive and mislead people as to their origin (Vol. III, 69-125). Outside the presence of the jury Fassnacht was allowed to testify that in preparation for his testimony in this case, he had examined some of the guns which were the subject of the instant indictment and he believed they were manufactured by the U.S. Government. Fassnacht was permitted to testify before the jury only that in his expert opinion, the guns were not of Russian origin; he was not permitted to testify about the CIA's activities (Vol. III, 137-91) or about the misleading marking on the guns intended to obfuscate and conceal their origins and the reasons why it was so difficult to identify the country of manufacture.

The court repeatedly instructed the jury that, while the materiality of the allegedly false statements was an element of the crime, materiality was a question

of law, for the court, not a question of fact, for the jury's determination, a question on which there is a clear conflict among the Circuits. The court instructed the jury that the alleged false statements were material (Vol. IV, 300, 301, 304).

The trial court's instructions to the jury emphasized that the issue in dispute was whether Petitioner believed the guns to have been Guatamalan in origin, not whether the guns were in fact Russian.* While the court made passing reference to the element of falsity in fact, charging that "a statement is false

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* In conference with counsel prior to charging the jury, the court had made its view of the case clear:

> In my best judgment, I'm prepared to tell the jury under the circumstances of this case ... they are to determine whether or not this gentleman knew [the statement] was false. They are not here to decide whether or not in truth and in fact those guns were made in Russia. (Vol. IV, 273)

if it was not true when made," its pre-summation instructions focused almost exclusively on the question whether Petitioner himself believed that the guns were of Guatamalan origin when he made those statements.

> What we're dealing with is belief. So it boils down to, did Mr. Cox believe the country of origin of the weapons and the parts that he described to be Guatamalan. See, he put down that the country of origin was Guatamala. When he signed the forms, each form in question, did he then believe that to be the truth or was it false as the government alleges.

(Vol. IV, 282)

During the main charge, the court again emphasized the Petitioner's subjective belief.

> So we're looking at what Roger Cox believed when he signed the form. We're not looking at what anyone else believed; what Roger Cox believed from all the facts and circumstances....

(Vol. IV, 302)

After deliberating for approximately four hours, the jury asked the court to explain

the term "when in truth in fact" used in the false statement counts of the indictment. Again, the court emphasized that the Petitioner's subjective belief was the sole issue for the jury's consideration.

> The question, if you want to boil that down to common sense language, it's just telling you in legal mumbo-jumbo, you might appropriately call it, that when Roger Allan Cox signed that form, it alleges that he then knew that as to his knowledge the guns in question were not made or manufactured in Guatamala. We're looking at what he believed at the time, not what anybody else believed. We're not here determining after the fact, the truth of the origin of those weapons. We're not here in a gun case. We're here determining what Roger Cox believed the place of manufacture of those guns was when he filled out that form. If he did not believe them to be really made in Guatamala and he put it on this form, then that obviously would be a falsity; .... (Vol. V, 319-20)

Petitioner vigorously objected to the court's supplemental instruction, noting that the court had eliminated the government's need to prove falsity in fact

(Vol. IV, 320-22). The court, in response, seemed to suggest that it was the Petitioner's obligation to prove that guns were manufactured in Guatamala (Vol. IV, 322).

The jury returned its guilty verdicts within 15 minutes of receiving the supplemental instruction (Vol. IV, 320, 324).

The trial court had also instructed the jury that, if guilty verdicts were rendered, the court could impose a probationary sentence or a sentence up to the maximum permitted by Congress. It advised the jurors that "it's all a matter of human judgment on the part of the Judge." (Vol. IV, 288).

On appeal to the Court of Appeals for the Eleventh Circuit, Petitioner argued, among other things, that the prosecution had failed to prove that the guns in fact originated in the Soviet Union, as charged in the indictment; that

the trial court's instructions to the jury were defective in removing the question of objective falsity from the jury; that the alleged false statements were not material; that the court's instruction to the jury with respect to the range of punishment that could be imposed was error, and that 26 U.S.C. § 5848 (1976) -- the statute which bars using any information from a registration form to charge any offense except perjury -- invalidated the convictions on Counts 1, 11 and 12.

The Court of Appeals wholly ingored some of the claims and rejected the others, and concluding that there were no errors in the trial court's handling of the case, it affirmed. A petition for rehearing was denied on April 18, 1983.

Reasons for Granting the Writ

This case raises important questions going to the integrity and

functioning of the system of criminal justice as administered in the federal courts. A federal statute designed to preserve the Fifth Amendment right to be free from compelled self-incrimination was misconstrued and rendered a nullity. A prosecution for making false statements resulted in guilty verdicts absent proof that the allegedly false statements were, in fact, false. The jury was, in essence, instructed to convict if it concluded that the Petitioner had meant to lie, whether or not he had in fact lied. Another essential element of the crime of false statements -- materiality -- was not submitted to the jury at all and no evidence of record exists to establish it. The jury was improperly instructed on the potential punishment which could be imposed if guilty verdicts were rendered. And the prosecution was tainted with the aura of the evils of communism and the Soviet Union despite the irrelevance of

such matters. In short, the handling of this case was infected by a host of serious errors which cumulatively made the trial a sham and the guilty verdicts a foreordained certainty.

Each of the individual issues raised is important. On one of them a clear conflict among the Circuits exists. Accordingly, this Court's responsibility for the supervision of the federal courts, and basic notions of simple justice require that this Court grant the writ of certiorari to review the judgment below.

I. The Government's Failure to Prove Two Essential Elements of the Crime of Making False Statements Against the United States -- Falsity and Materiality -- and the Trial Court's Failure Properly to Submit those Questions to the Jury Render the Judgment of Conviction Infirm

The indictment in this case charged that the Petitioner described certain firearms as "1938 Guatamalan" when "in truth and fact" he knew that they were Degtyarev "DP" light machine guns

manufactured in the Soviet Union. Under the indictment, then, and under the law of false statements, in order to sustain a conviction, the government was compelled to prove, among other things, that those statements were false and that they were material. Petitioner maintains that the prosecution failed to prove both of these elements of the crime.

Alternatively, even if it were the case that sufficient proof was offered on these elements, the trial court's charge to the jury served to remove these issues from the jury's consideration. The trial court's instructions with respect to objective falsity and subjective falsity effectively told the jury it need not find that the statements were in fact false in order to convict, only that the Petitioner believed them to be false. With respect to materiality, the trial court ruled that this was a question for the court,

instructing the jury that the statements were material.

In certain respects, Petitioner recognizes that his is an unusual, even a unique, case. The precise configuration of facts -- a false statement case where a primary issue is whether the statement was in fact false -- is unlikely to arise in many other prosecutions. In another respect, however, the issues he raises necessarily arise in every criminal prosecution brought by the United States and, from that perspective, the case merits this Court's consideration. Unless the rule of law that in a criminal prosecution the government must prove each and every element of the crime beyond a reasonable doubt is respected and enforced, the basic underpinnings of our system of criminal justice are compromised. In the circumstances of this case, failure to respect that rule means that bad thoughts -- an intention to do

wrong -- even in the absence of bad acts -- the actual doing of wrong -- are punishable, in contradiction of the basic principle of criminal responsibility, which requires both mens rea and actus reus.*

This case thus presents a variant of a subject to which much scholarly attention has been paid: where a defendant intends to commit a crime but what he does is not a crime, can he be punished. Generally, the debate focuses on whether, under such circumstances, the defendant may be convicted of attempt. The classic illustration, of course, involves the well-known hypothetical involving "Lady Eldon's French Lace." See Kadish & Paulsen, Criminal Law and Its

* The Court of Appeals simply refused to address this fundamental issue even though it was clearly presented to it. The court dealt only with the issue of mens rea, a separate issue raised by Petitioner, who contends that he believed that Guatamala was the place of the firearms' mannufacture.

Processes 362 (3d ed.), quoting 1 Wharton, Criminal Law 304 n.9 (12th ed. 1932). See also United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973); People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906).

In this case, however, the Court need not resolve that difficult question, for it is surely beyond debate that one cannot be convicted of the completed crime of making a false statement, where the statement made, even if arguably thought to be false,* was not in fact false or,

* Petitioner contended, at trial, that he did not believe his statements identifying the origin of the weapons were false. The ruling of the trial court, excluding the testimony of Fassnacht as to the CIA's remanufacture of the weapons in the United States and its efforts to disguise the origins of the remanufactured weapons, was, accordingly, error for it excluded relevant evidence which would have explained how Petitioner could have concluded that the guns were not Russian and the reasonableness of that belief.

Despite the fact that Fassnacht was prepared to testify that the weapons were modified by the CIA to fool those who came into possession of them, the trial court ruled that the testimony was irrelevant. The court arrived at this conclusion even

more specifically, was not proved to be false. To state the matter simply, and from a different angle, the Constitution requires proof beyond a reasonable doubt of all elements of an offense in order to sustain a conviction. In re Winship, 397

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though Petitioner testified that he was confused about the weapons' origins by the "MAS" marking on the gun which he knew was not in the Cyrillic alphabet but was in the alphabet used in Guatamala.

The Court of Appeals upheld this evidentiary ruling, but only by mischaracterizing Fassnacht's proffered testimony and stating, erroneously, that Fassnacht would not have testified that the guns were not originally manufactured in the Soviet Union. In fact, Fassnacht would have testified that some of the weapons' parts were manufactured in Russia and some in Yugoslavia, and that the weapons were remanufactured in the United States. To characterize such testimony, as did the Court of Appeals, as supportive of the prosecution is disingenuous. Fassnacht knew of the CIA's efforts to obfuscate the origin of the weapons and parts. Petitioner did not know of this history, but concluded, in part on the basis of marking apparently placed on the guns by the CIA, that the weapons were not Russian. Fassnacht's testimony, therefore, would clearly have supported the reasonableness of Petitioner's belief.

U.S. 358 (1970). See also Jackson v. Virginia, 433 U.S. 307 (1977) (a criminal conviction based upon a record wholly devoid of any relevant evidence of a crucial element of an offense is constitutionally infirm). That constitutional command was violated here. The Government's theory is an unprecedented assertion that a mistake of fact can turn an otherwise truthful and innocent statement into a punishable false statement.

A. Falsity in Fact -- The Failure of Proof

The government's theory was that it could prove falsity of the statement that the guns were Guatamalan by proving that they were manufactured in Russia. But the government failed to prove that that was the case. Aside from the testimony about statements by the Petitioner himself, which are discussed below, its only evidence of the origin of the weapons was

a brief statement by York, who purchased two of the subject weapons from the Petitioner, that "from the markings and so forth they appear to be of Russian origin." (Vol. II, 200) Although he did not testify as an expert, his conclusion was based on "a number of reference books that referred to Russian-built small arms." On cross-examination, he conceded that the reference works indicate that these guns may also have been manufactured somewhere other than the Soviet Union, specifically in Communist China. He emphasized, also on cross-examination, that the guns "appeared to be of Russian origin," adding, "The guns could have been manufactured all over the world." (Vol. II, 207).*

The trial court seized on this testimony, and on testimony with respect

* Bliss, another purchaser, testified, "As near as I know, it [DP's are] manufactured in the Soviet Union." (Vol. I, 184)

to certain references by the Petitioner himself to the weapons as Soviet DP's,** as proof sufficient to defeat a motion for a directed verdict of acquittal.

The Court of Appeals, implicitly recognizing the weakness of the proof, completely ignored his claim that the government failed to prove the firearms were not Guatamalan. Instead, it misstated his claim, addressing only his claim that the government had failed to prove that he knew the guns were Russian in origin. Addressing that claim, the

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** The Petitioner's own references to the guns by Soviet terminology are not proof of their origin in fact. As he (and others) testified, there is no dispute that the weapons are of Soviet design and accordingly he referred to them that way -- that is simply an ambiguity of weapons terminology. As for testimony that the Petitioner told others that he would describe them on forms as Guatamalan because the government would not permit the importation of Soviet weapons, that too would tend to prove that the Petitioner thought they were Soviet in origin, not that they were in fact Soviet in origin. Petitioner is no expert on Soviet arms.

Court of Appeals ruled that, although the indictment charged that the Petitioner knew "in truth and fact" that the weapons were made in Russia, the government did not have to prove that he knew they were Russian in origin. In the Court of Appeals' words:

> Whether the guns were made in Russia, or for that matter, in Canada or Africa would not change the fact that [Cox] knew they were not manufactured in Guatamala.

But, to paraphrase the Court of Appeals, it makes no difference whether the Petitioner believed the guns were made in Russia, or for that matter, in Canada or Africa. If in fact the guns were made in Guatamala, he could not be convicted of a crime of making a false statement.

The Court of Appeals never addressed Petitioner's claim that the government had failed to prove falsity in fact. It simply ignored this essential element of the crime.

B. Falsity in Fact -- The Instructions

Even if there existed sufficient evidence on the element of falsity in fact to warrant sending the case to the jury, the trial court's erroneous instructions on this element told the jury, in essence, that it need not find falsity in fact in order to convict, only that the Petitioner believed his statements to be false.

Petitioner recognizes that the jury instructions did mention, on several occasions, falsity in fact. But, always, what the court gave with one hand it more than took away with the other since the court believed that the sole issue was Petitioner's state of mind and not falsity in fact. Thus, in its preliminary charge given prior to closing arguments, the court instructed the jurors:

> What we're dealing with is belief. So it boils down to, did Mr. Cox believe the country of origin of the weapons and the parts that he described to be Guatamalan. See, he put down that the country of

> origin was Guatamala. When he signed the forms, each form in question, did he then believe that to be the truth or was it false as the government alleges. Now, falsity can arise from the weapon having been in truth and fact made in Soviet Russia or any other country other than Guatamala.... (Vol. IV, 282)

In its main charge, the Court, reviewed the elements of the crime and defined falsity, but again confused objective and subjective falsity:

> A statement or a document is false when made or used if it is untrue when made and is then known to be untrue by the person making or using it.

(Vol. IV, 299)

This statement was followed by a lengthy instruction on the question how to determine whether Petitioner believed the statement to be false.

The jurors, after deliberating for four hours, and obviously confused about this issue, returned with a question: "Please explain the term 'when in truth

and fact' as used in Counts Two through Ten." The court advised them as follows:

> Now, the way that an indictment is prepared doesn't track the exact language of the statute. It includes language that's not in the statute. To the extent that the indictment does, the language is what we call surplusage, it's unnecessary. There's nothing in that statute that says "in truth and fact." So that language is just extra. That's the reason it wasn't explained to you before. The question, if you want to boil that down to common sense language, it's just telling you in legal mumbo jumbo, you might appropriately call it, that when Roger Allan Cox signed that form, it alleges that he then knew that as to his knowledge the guns in question were not made or manufactured in Guatamala. We're looking at what he believed at the time, not what anybody else believed. <u>We're not here determining after the fact the truth of the origin of those weapons</u>. (Vol. IV, 319-20)

Thus, again, the court in essense eliminated the jury's inevitable confusion about the issue of falsity in fact by in effect telling them that it was not an

issue: the question for them was what Petitioner believed.

The Court of Appeals ruled that there was no error in the instruction, stating that the trial court had the "difficult task" of instructing the jury about both objective falsity -- falsity in fact -- and subjective falsity -- the defendant's belief and knowledge that his statements were false, and that it had performed this task properly.

The Court of Appeals erred. The distinction is by no means a difficult one to explain and the jury's puzzlement was obviously a result of the trial court's initially confusing instructions. The jury, in asking its question, sought clarification of this court-created confusion, but instead it received more obfuscation. Even assuming that to establish falsity in fact the jury did not have to find that the guns were indeed manufactured in the Soviet Union, only

that they were not manufactured in Guatamala, the instruction was still wrong. In the circumstances of the case, where the government sought to establish that the guns were not Guatamalan (and that the statement was therefore false) by showing that they were Russian, and where there was no suggestion by the government that the guns were of any origin other than Soviet, the jury did of course have to find that the guns were Soviet in origin in order to convict. But the jury was initially specifically instructed not to concern itself with determining the actual origin of the guns! And, in supplemental instructions, the jury was informed, "If he did not believe them to really be made in Guatamala ... then that obviously would be a falsity." Accordingly, the question whether the statements were in fact false -- an essential element of the crime, and one on which there was little or, as Petitioner

contends, no, competent proof -- was not submitted to the jury.

C. Materiality -- Failure of Proof

In the trial court and in the Court of Appeals, Petitioner argued that the prosecution had failed to prove that the statements were material, another essential element of the crime of making a false statement.

The test of materiality is whether the statement is "capable of influencing the action of the agency." See, e.g., United States v. Talkington, 589 F.2d 415 (9th Cir. 1978); United States v. Beer, 518 F.2d 168 (5th Cir. 1975). Although the agency need not necessarily have relied or acted to its detriment upon the allegedly false statement, "... the government must still show that the statement had the capacity to influence a determination required to be made." Id. at 172.

There is absolutely no evidence of record to support a finding of materiality.* No customs or BATF witness was ever asked or testified about the potential effect of a false answer in the documents at issue in the false statement counts. There was no evidence of any reliance upon those statements. A statement that is factually true can never be material as that term is used in the law of perjury. The concept of

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* Despite the aura of the Communist danger, no proof was introduced to show that, had Petitioner stated that the guns were of Russian manufacture, it would have in any way affected the agency's decision to allow them into the United States. A lack of evidence indicates that the contrary is the case. Clearly, it is not material if the guns were manufactured or remanufactured in the United States or in any other non-Communist country aside from Guatamala. Thus, the assertion that the guns were of Guatamalan instead of any other manufacture is irrelevant and non-material. Moreover, the whole purpose of the statutory scheme relates to the country from which the firearm is imported, not manufactured. In this context, where a gun made in 1938 was manufactured can in no way be relevant to the United States with respect to customs documents for importation purposes.

materiality is designed to assure that the government agency could in fact have been adversely affected by the content of the statement and that the statement was not merely abstractly false. In this case, since the statement may not be deemed to have been factually false, the agency could not have been adversely affected, even if it is assumed that Petitioner believed his statement to have been false. Thus, another essential element of the crime of false statements went unproved.

D. Materiality -- The Circuits are in Conflict on whether Materiality is a Question for the Court or for the Jury

The trial court, in its instructions to the jury, advised that, while materiality was an element of the crime, the question of materiality was one of law, for the court, not one of fact, for the jury. The court further charged that the alleged falsities were material.

Petitioner recognizes that the ruling that materiality is a question of law for the court to determine was compelled by Circuit precedent. See United States v. Haynie, 568 F.2d 1091 (5th Cir. 1978); United States v. Beer, 518 F.2d 168 (5th Cir. 1975); Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (Eleventh Circuit adopted the law of the Fifth Circuit). It is, moreover, the rule, recognized not only in the Fifth and Eleventh Circuits, but also in the Second, see United States v. Bernard, 384 F.2d 915 (2d Cir. 1967) and in the Fourth, see United States v. Ivey, 322 F.2d 523 (4th Cir.), cert. denied, 375 U.S. 953 (1963).

There is a sharp conflict in the Circuits. The rule is otherwise in the Ninth and Tenth Circuits. In United States v. Irwin, 654 F.2d 671 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982), the court stated the rule to be that "materiality is a factual question to be

submitted to the jury with proper instructions like other essential elements of the offense, unless the court rules, as a matter of law, that no submissible case is made out by the government on the issue...." Id. at 677, n.8. The rule is the same in the Ninth Circuit. See United States v. Valdez, 594 F.2d 725 (9th Cir. 1979) ("Since it is an essential element, materiality, as with all of the other elements of the offense charged, must be determined by the jury.")

The conflict among the Circuits cannot be resolved without a ruling from this Court. Resolution of what issues the jury must determine in a false statement case is of real importance in every prosecution under 18 U.S.C. § 1001. Materiality was a genuine disputed issue in the case at bar; and, because it was a question that went to the defendant's guilt or innocence, it was a question for the jury's determination. See Ford v.

United States, 273 U.S. 593 (1927). Materiality is not a "jurisdictional" question, but a classic question of fact, directly related to the defendant's guilt or innocence, and well within the competence of the jurors. Petitioner was entitled to have that question determined by the jury.

II. The Court of Appeals Misconstrued 26 U.S.C. § 5848 which Barred Prosecution of Counts 1, 11 and 12, thereby Frustrating the Intent of Congress and Depriving the Petitioner of his Fifth Amendment Right Against Self-Incrimination

Following this Court's decision in Haynes v. United States, 390 U.S. 85 (1968), Congress revised the National Firearms Act. See United States v. Freed, 401 U.S. 601 (1971). In Haynes this Court invalidated provisions of the Act because such provisions compelled disclosure of possession by registration which meant that a possessor was required to furnish potentially incriminating information to the federal government inconsistent with

the Self-Incrimination Clause of the Fifth Amendment.

To eliminate the constitutional defects discussed in Haynes, certain provisions were adopted by Congress in the National Firearms Act to bar prosecution resulting from the compelled disclosure. As noted by the Court in United States v. Freed in discussing these revisions

> The revised statute explicitly states that no information or evidence provided in compliance with the registration or transfer provisions of the Act can be used, directly or indirectly, as evidence against the registrant or applicant "in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence."

401 U.S. at 604

The only exception to this rule barring prosecution is contained in 26 U.S.C. § 5848(b) which provides that the bar does not apply "under any applicable

provision of law with respect to the furnishing of false information."

The Conference Report (No. 1956) establishes that the scope of the exclusiionary rule, even with the exception, was very broad. Thus the Report states:

> Elimination of any element of self-incrimination.--In Haynes v. United States the Supreme Court held the registration requirement of existing law constitutionally unenforceable because it required registration almost exclusively by those in illegal possession of a weapon and made this information available to prosecute them for illegal possession. The Senate amendment avoids this problem by extending the registration obligation to all possessors of the weapons--legitimate or otherwise--and by providing that registration information may not be used directly or indirectly to prosecute a natural person for an offense prior to or concurrent with his registration.

1968 U. S. Code and Administrative News 4410, 4435.

In the instant case three of the counts were premised upon evidence disclosed by the relevant application and

records despite the constitutionally mandated bar to prosecution. Count 1 alleged a conspiracy to import Russian-made machine guns contrary to law. Counts 11 and 12 charge concealment of five Russian machine guns imported contrary to law. The evidence on each of these counts was derived from the documents filed by Petitioner. Thus, for example, the concealing charges contained in Counts 11 and 12 were nothing more than claims that Petitioner's open possession of the guns was illegal because the guns were admitted into this country contrary to law, since Petitioner stated that the guns were manufactured in Guatemala.* Apart from Petitioner's statement no other evidence of concealment was presented in support of Counts 11 and 12.

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* The term concealing seems entirely inappropriate in the context of this case. Petitioner not only never concealed the guns nor the relevant documents but he was completely open and forthright throughout about his possession.

The Court of Appeals avoided this dilemma by an imaginative legerdemain. The Court stated that "The Government merely used the form to demonstrate that the guns were brought into this country fraudulently, which is contrary to law." The Court then states that this is "with respect to" the furnishing of false information and therefore permissible under subsection (b). The Court concluded by saying "accordingly, Counts 11 and 12 are not multiplicious and do not violate the exclusionary rule set forth in § 5848.

It would appear that the Court of Appeals does not avoid but rather creates a dilemma. Interpreting subsection (b) as did the Court of Appeals renders the exception to the prosecutory bar so broad as to defeat the constitutional requirement which mandates that bar. This "with respect to" interpretation is also fundamentally inconsistent with the legislative history. In any event, if the

conspiracy count (Count 1) and the concealing counts (Counts 11 and 12) are "with respect to the furnishing of false information" the case raises classic double jeopardy problems. Petitioner would stand convicted of making false statements to bring the guns into the United States and also stand separately convicted for having brought the guns into the United States by making the same false statements. To avoid this double jeopardy problem the concealment charges must be separated from the false information. To do so runs directly into the statutory bar problem.

III. The Trial Court's Instructions to the Jury With Regard to Sentencing Confused the Respective Roles of Judge and Jury and Prejudiced the Petitioner

In its instructions the trial court advised the jury that it was not to be concerned with possible punishment. The jury was, however, obviously concerned and the court acknowledged this: "Now, even

though that is not your responsibility, by your questions you have indicated some interest in how the Court goes about performing its duty." (Vol. IV, 287) The court then went on to explain sentencing procedure, describing the preparation of a pre-sentence report by the probation department, the sentencing hearing, and the pronouncement of sentence. The court added:

> The range of sentence that may be imposed by the Court is determined by Congress when they passed the law. They set a maximum sentence that may be imposed in any case. The Judge, under the law, is permitted to impose anything from a term of probation or a fine up to the maximum term of imprisonment that Congress has set. In other words, it's all a matter of human judgment on the part of the Judge. (Vol. IV, 288)

No mention was made of the fact that a maximum sentence of sixty years incarceration could be imposed. Petitioner objected to the instruction with respect to sentencing (Vol. IV, 316).

No curative instruction was given. Petitioner was, in fact, sentenced to the maximum, albeit a portion of the sentence was suspended.

The Court of Appeals, acknowledging that it "does not approve of informing a jury of a minimum or maximum sentence," nevertheless held that there was no error in the trial court's instruction. In that, the court erred.

In the federal system, it is clear that punishment is not the concern of the jury. As the Fifth Circuit stated in United States v. Del Toro, 426 F.2d 181, 184 (5th Cir. 1979), quoting Pope v. United States, 298 F.2d 507 (5th Cir. 1962):

> To inform the jury [concerning] matters relating to disposition of the defendant, tends to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided.

In the context of this case, the dangers to which the Fifth Circuit has alluded were real ones.

The jury had previously demonstrated an interest in punishment. Immediately prior to the testimony of prosecution witness and co-conspirator Faust, the purchaser of the entire arms shipment, the court advised the jury that he had entered a plea agreement under which the government agreed to recommend a sentence of one year and a fine of $2,000, but that execution of the sentence be suspended and he be placed on probation for two years. A juror asked about a fine Faust testified he paid. The jury's continuing interest in the question of punishment was demonstrated by its question with respect to sentencing of the Petitioner.

With knowledge that the co-defendant who had much greater involvement had received a probationary

sentence and that probation could be imposed on Petitioner, the jury might well have convicted Petitioner on the assumption that the court, using "humane judgment" would impose only a sentence of probation on Petitioner. Given the proofs and the jury instructions under which the jury might have and must have found that the Petitioner intended to do wrong (whether or not what he had done was actually an illegal act), the jury may well have believed that Petitioner "deserved" a little bit of punishment, and convicted on that ground.

In virtually every criminal prosecution, the natural human curiosity of jurors will make them interested in the potential consequences of their verdict. But, in the federal system punishment is not a proper concern of the jury. Where there is no statutory provision giving the jury the right to determine punishment, its function is exhausted by its

determination of guilt. Berra v. United States, 351 U.S. 131, 135 (1956). Any interest or curiosity in the subject on its part should have been firmly discouraged, not pandered to by instructions like the one given in this case. This Court should accept this case and reiterate the basic principle in our jurisprudence that punishment is not a question for the jury.

Conclusion

For the reasons stated, Petitioner respectfully prays that this Court grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. Court of Appeals
Eleventh Circuit
F I L E D

Apr. 18 1983

Norman E. Zoller
Clerk

No. 82-8062

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROGER ALAN COX,

Defendant-Appellant.

- - - - - - - - - - - - -

Appeal from the United States
District Court for the
Middle District of Georgia

- - - - - - - - - - - - -

ON PETITION FOR REHEARING

(April 18, 1983)

Before HILL and VANCE, Circuit Judges, and TUTTLE, Senior Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

REHG-4

UNITED STATES of America,
Plaintiff-Appellee,

v.

Roger Alan COX, Defendant-Appellant

No. 82-8062

United States Court of Appeals,
Eleventh Circuit.

Jan. 31, 1983.

Appeal from the United States District Court for the Middle District of Georgia.

Before HILL and VANCE, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JAMES C. HILL, Circuit Judge:

FACTS

Roger Alan Cox, was tried and convicted on a twelve count indictment charging conspiracy against the United States, in violation of 18 U.S.C. § 371 (1976), making false statements against the United States in violation of 18 U.S.C. § 1001 (1976), and concealing and transporting merchandise imported contrary to law, in violation of 18 U.S.C. § 545 (1976). The appellant was sentenced to consecutive

five-year sentences on each count. All but two consecutive periods of six months each were suspended, pending a five-year period of probation. The appellant was further ordered to pay costs of his prosecution. Mr. Cox now appeals his conviction.

The appellant is a federally licensed firearms dealer doing business as Law Enforcement Ordinance Company in Athens, Georgia. Mr. Cox supplied police departments throughout the United States with police equipment and firearms. In December of 1971, the appellant met Mr. Ronald J. Martin from Miami, Florida. Mr. Martin had access to a large quantity of firearms available for sale in Guatemala. The appellant was interested in purchasing some of these weapons but needed a financial backer to complete the transaction. The appellant contacted Mr. Edward Louis Faust, a firearms dealer in

Sacramento, California. Mr. Faust expressed an interest in purchasing some of the weapons but only upon inspection. Pursuant to their conversation Mr. Faust, Mr. Martin and the appellant flew to Guatemala to inspect the guns. Upon inspection, the appellant purchased over five thousand firearms. Among these weapons were approximately one hundred Russian type Degtyarev DP 7.62 millimeter submachine guns. Although the appellant recognized these weapons as being Russian, he noted that they appeared slightly different from the Russian submachine guns he had been previously familiar with. In discussing the origin of the guns, Mr. Martin commented that as far as he knew the guns were probably made in Guatemala or else they were possibly among some of the weapons sent by the United States to Guatemala back in 1954.

The appellant filled out the appropriate forms for importing foreign made guns. Question number eight on the form requested the place of manufacture. The appellant responded to this question with "Guatemalan Model 1938." The appellant contends he was not sure of where the guns were originally made and therefore, he chose to put down on the form the place from which the guns were being shipped--Guatemala.

I.

The indictment in this case charged that appellant knowingly falsified documents about the origin of the Russian submachine guns, when in truth and fact he knew they were made in Russia. The appellant masterfully seized upon the language in the latter part of this sentence. He went to great lengths to demonstrate that the Government did not prove the appellant knew the guns were of Russian origin.

While the evidence would support a finding that Mr. Cox knew the guns were made in Russia, it was not necessary that the Government prove this point. The crime charged was falsifying the forms for the importation of foreign made weapons into the United States. Therefore, the question was not whether Mr. Cox knew the guns were made in Russia, but rather if he knew they were not made in Guatemala.

Viewing the evidence in a light most favorable to the Government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); United States v. Davis, 679 F.2d 845 (11th Cir. 1982), the Government sufficiently proved that the appellant knew the guns were not made in Guatemala. Accordingly, when the appellant filled out the importation forms, he knowingly and falsely stated that the weapons were made in Guatemala. Although the appellant raises a clever

defense by attempting to convince the jury that because he did not know the guns were of Russian origin he was not guilty, this defense was only a smoke screen which the jury apparently saw through. Whether the guns were made in Russia, or for that matter, in Canada or Africa would not change the fact that the appellant knew they were not manufactured in Guatemala.

II.

The appellant also contends that the trial court's refusal to admit certain expert testimony was error. The appellant called a forensic firearms expert to testify about the CIA's activities involving the remanufacture of certain weapons and their shipment to Guatemala in 1954.

This expert was called to demonstrate to the jury that the CIA had taken Korean battlefield scrap Russian machine guns and

remanufactured them. These weapons were then shipped to Guatemala.

The information offered by this witness regarding the activities of the CIA was not probative of the two purposes for which it was urged. The appellant initially offered this testimony as evidence of the appellant's subjective belief as to the origin of the guns. The appellant was attempting to prove that because the expert had concluded the guns in question may have been among the guns which were remanufactured in the United States in 1954, it was reasonable for the appellant to conclude the same thing. Although this may have been effective evidence if the appellant could demonstrate that he relied on the expert's opinion when he purchased the guns, the appellant had never known of this expert or his testimony until the trial. Because the appellant did not know of the expert's opinion when he purchased the guns and he,

therefore, did not rely on this information, admission of this testimony would have only misled or confused the jury. See United States v. White, 216 F.2d 1 (5th Cir.1954).

The second theory upon which the appellant urged admission of this testimony was to impeach the Government's witnesses whose testimony in this area only supported the Government's theory that the guns were of Russian origin.

Moreover, the witness claimed he had first hand knowledge of examining some Russian submachine guns back in 1954. However, his knowledge that the CIA had purposefully taken scrap pieces and remanufactured them into machine guns was based on hearsay. Although certain hearsay testimony by experts is permitted, it must be based on the type of evidence "reasonably relied upon by experts in the particular field in forming opinions or

inferences upon the subject." Federal Rule of Evidence § 703. The testimony being offered by this witness was of an historical nature; it was not based upon "knowledge, skill, experience, training or education" gathered in a scientific or technical manner. Federal Rule of Evidence § 702. Because this testimony was primarily based on hearsay and was not relied upon by the appellant, we find the exclusion of this testimony well within the trial judge's discretion.

The appellant also raises objections to several portions of the jury instructions given by the trial court. Appellant specifically objected to the court's instructions which, according to the appellant, removed the issue of objective falsity or falsity in fact. Throughout the charge the court did define objective falsity as "[a] statement is false if it was untrue when made and was then known to

be untrue by the person making it or causing it to be made." Record on Appeal at 296. Appellant conceded that the judge defined objective falsity, but contends that other charges given in essence obliterated the objective falsity instruction. The trial judge did instruct the jury as to the relevance of the appellant's subjective belief when he signed the form. The judge in instructing the jury stated that

> [s]o we're looking at what Roger Cox believed when he signed the form. We're not looking at what anyone else believed; what Roger Cox believed from all the facts and circumstances. You could think of it as if you were Roger Cox, having his education, his experience, doing all that you heard the evidence shows that he did, received all the information that the evidence shows he received and was exposed to and when

you sat down to fill out the form in question, would you believe that the firearm in question was made or in this case manufactured in Guatemala. Just put yourself in his shoes.

Record on Appeal at 302

This instruction was given by the court in an effort to explain what the element of "knowingly" meant. The element of knowingly requires the jury to attempt to assess whether the defendant subjectively knew that the information he was providing was false. As to the element of knowingly, it is reasonable for the court to inform the jury that they must attempt to view this element by looking at whether the evidence showed that the defendant knew he filled out the form falsely.

It appears from the record the court went to great lengths to explain the subjective standard of "knowingly" so as to demonstrate to the jury the difference

between this element and the element of "falsity in fact." The court had the difficult task of informing the jury that they must first find that the weapons were not made in Guatemala. This is the falsity in fact element which requires an objective standard. Secondly, the jury had to find that the defendant, with knowledge, falsified the documents in question. This element requires a subjective standard.

The appellant's argument confuses the subjective standard given by the court, for the element of knowingly, with the objective element of falsity in fact. The record does not indicate this happened. Quite the contrary, the record clearly delineates the element of falsity in fact with the definition of that term and the element of "knowingly." Accordingly, we find no error in this part of the court's instruction.

The appellant further objects to the charge the court gave on specific intent. Appellant suggests that the court gave no instruction as to Counts II-VIII on the necessary element of specific intent. The court simply declined to use the term specific intent, and instead defined and referred to the need for the jury to find that the defendant knowingly and willingly made a false statement relative to a material matter. The charge to the jury need not conform to the language of the defendant's request, as long as it clearly and accurately states the proposition. United States v. Baker, 626 F.2d 512, 516 (5th Cir.1980). The elements of specific intent are knowingly and willfully. See United States v. Lange, 528 F.2d 1280 (5th Cir.1976); United States v. Smith, 523 F.2d 771 (5th Cir.1975).

Because the court clearly delineated on several occasions that an essential

element to convict the defendant was whether he knowingly and willfully falsified the documents we find no error in the trial court's explanation of specific intent.

The appellant further contends that the trial court erred by failing to give an instruction on ignorance of the law. The trial court refused to give this instruction because the judge concluded that no evidence was presented to warrant this type of instruction. The appellant maintained throughout his defense that he believed the guns were made in Guatemala. His defense was not that he thought the form only required place of shipment, rather than place of manufacture. It is only upon appeal that this assertion is made. An instruction on ignorance of the law would be warranted only if the appellant contended he was unaware that he was obliged to put down the country of

manufacture. The appellant did not contend this, and for good reason, since the form specifically requests at question number eight "name and address of manufacturer." It would have been difficult for the appellant to argue ignorance of the law under these circumstances. The trial court properly excluded an instruction on ignorance of the law.

Finally, the appellant objected to the following instruction given by the trial court: "the Judge, under the law, is permitted to impose anything from a term of probation or a fine up to the maximum term of imprisonment that Congress has set." Record on Appeal at 288. Appellant points to several cases where the trial court was supported by the appellate court for not commenting on the issue of possible punishment. This court does not approve of informing a jury of a minimum

or maximum punishment. See Pope v. United States, 298 F.2d 507 (5th Cir.1962).

However, in this case, the judge was not attempting to let the jury know what type of punishment might be ordered. The judge properly informed the jury that punishment should be of no concern to the jury. The jury was informed, generally speaking, about the procedures involved when a judge goes about sentencing. This information was given to the jury because they had asked questions about the potential punishment and how it is decided. The instruction was not given as to the specific defendant, Mr. Cox, but rather, was given as general information about sentencing procedure.

In United States v. Stanley, 433 F.2d 637 (5th Cir.1970), an objection was raised to the court's instruction stating: "I charge you that you are not concerned when you make a determination of

guilt or innocence with any punishment that may be imposed, whether it be probation or whether it be a fine or whether it be a penitentiary sentence." Id. at 639. The court concluded that this instruction was not erroneous. The court noted that this type of instruction became necessary because of a comment made by defense counsel referring to the potential maximum sentence.

In the instant case the judge's reference to sentencing concerned the range of potential punishment, without referring to a specific maximum other than that delineated by Congress. The judge in no way intimated what punishment he might be inclined to give. He also consistently informed the jury that potential punishment was not their concern; they were only to look for the truth and provide a verdict according to what the evidence demonstrated. Although this

court prefers no reference to sentencing whatsoever, we find no error in the trial court's instruction.

III.

The appellant also contends that Counts XI and XII, charging the concealment and facilitation of the transport of illegally imported goods in violation of 18 U.S.C. § 545 (1976), are not valid due to the exclusionary rule set forth in 26 U.S.C. § 5848 (1976). The exclusionary rule states:

> (a) General rule. - No information or evidence obtained from an application registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that

person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence.

(b) Furnishing false information. - Subsection (a) of this section shall not preclude the use of any such information or evidence in a prosecution or other action under any applicable provision of law with respect to the furnishing of false information.

The appellant contends that the substance of the Counts XI and XII is based on the information obtained in his importation documents and therefore, is subject to the exclusionary rule which should bar prosecution on those counts. The purpose of this exclusionary rule is to avoid the potential self-incrimination problems inherent in any registration scheme.

Congress has granted use immunity regarding the information contained in registration documents. See United States v. Freed, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971); Haynes v. United States, 390 U.S. 85, 88 SS.Ct. 722, 19 L.Ed.2d 923 (1968).

However, the granting of this immunity does not exclude the prosecution of any and all crimes as evidenced by subsection (b). The Government proved that appellant transported two of these weapons through customs to his office in Athens, Georgia. The statute for the importation violation also requires proof that the merchandise was transported "contrary to law." The Government used the form, falsely filled out by the appellant, to demonstrate that the guns had been imported contrary to law. The Government was not using any information on the form as against the appellant whereby any fifth amendment,

self incrimination problems could develop. The Government merely used the form to demonstrate that the guns were brought into this country fraudulently, which is contrary to law. Further, subsection (b) precludes the application of subsection (a) for prosecutions "with respect to" the furnishing of false information. The importation violation is clearly "with respect to" a prosecution for furnishing false information. Accordingly, Counts XI and XII are not multiplicious and do not violate the exclusionary rule set forth in §5848.

IV.

The appellant on February 4, 1982, filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court, to discharge his debts. On April 8, 1982, the trial court ordered the appellant to deposit the entire amount of the costs of prosecution, or to post a bond in lieu of,

pending his appeal. Appellant subsequently filed a bond for the costs of his prosecution. Appellant now appeals the trial court's order to pay costs. Appellant's appeal for having to post bond is moot before this court as appellant chose to post the bond rather than refusing to pay while petitioning for a writ of mandamus. Because the bond has been posted, the only remaining issue is whether the costs of the prosecution are dischargeable in bankruptcy. We conclude that this question should be decided by the Bankruptcy Court where this issue is presently pending.

Because we find no errors in the trial court's decisions, we

AFFIRM

No. 82-2069

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROGER ALAN COX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's convictions for making false statements in violation of 18 U.S.C. 1001.

2. Whether the trial court properly instructed the jury concerning the false statement offenses.

3. Whether the trial court was required to submit the question of materiality to the jury in connection with the false statement offenses and whether the finding of materiality was supported by the evidence.

4. Whether information protected under 26 U.S.C. 5848(a) was used against petitioner at trial.

5. Whether the trial court's reference to sentencing in its instructions to the jury denied petitioner a fair trial.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A24) is reported at 696 F.2d 1294.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1983. A petition for rehearing was denied on April 18, 1983 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on June 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on seven counts of making false statements in connection with importation of submachine guns into the United States, in violation of 18 U.S.C. 1001 (Counts 2-8), two counts of making false statements in records required to be

maintained by firearms dealers, in violation of 18 U.S.C. 924(a) (Counts 9-10), two counts of smuggling submachine guns into the United States, in violation of 18 U.S.C. 545 (Counts 11-12), and one count of conspiring to smuggle submachine guns, in violation of 18 U.S.C. 371 (Count 1). He was sentenced to a total term of 60 years' imprisonment, all but one year of which was suspended, and to a five-year term of probation (Pet. App. A3-A4).

1. The evidence at trial (see Pet. App. A4-A6) showed that petitioner is a federally licensed firearms dealer based in Athens, Georgia. In 1978 and 1979, petitioner purchased surplus Guatemalan Army firearms through Ronald J. Martin, a gun dealer located in Miami, Florida. In May 1979, Martin, petitioner, and co-defendant Edward Faust, a California firearms dealer,[1] traveled to Guatemala to inspect firearms and to consummate a sales transaction. After inspecting the weapons, petitioner and Faust purchased 5,200 firearms, including 100 Russian-type Degtyarev DP 7.62 millimeter submachine guns, for approximately $280,000 (I Tr. 85-90). Petitioner recognized that the submachine guns were of Russian origin (*id.* at 91-92), but he told Faust that "the guns would have to be called Guatemalan in order to allow them to be imported * * * into the U.S." (*id.* at 95).

Thereafter, petitioner and Faust arranged for shipment of the weapons from Guatemala to the "foreign trade zone" administered by the United States Customs Service in San Francisco (I Tr. 94). During the next few months, petitioner filled out applications for import permits and related forms, on which he identified the guns as "Guatemalan Model 1938" and Guatemala as the place of manufacture (Pet. App. A6).

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[1]Faust pleaded guilty to a reduced charge and testified for the government at petitioner's trial (I Tr. 78-81).

2. The court of appeals affirmed (Pet. App. A3-A24). The court concluded that the government had presented sufficient evidence to prove that petitioner knew the guns were not made in Guatemala (*id.* at A6-A8); that the trial court did not err in excluding certain expert testimony about CIA activities (*id.* at A8-A11); that the jury instructions were proper (*id.* at A11-A20); that petitioner's conviction on two counts did not violate the exclusionary rule set forth in 26 U.S.C. 5848 (Pet. App. A20-A23); and that the question whether the costs of prosecution were dischargeable in bankruptcy should be decided by the bankruptcy court (*id.* at A23-A24).

ARGUMENT

1. Petitioner contends (Pet. 26-29) that there was insufficient evidence of the "objective falsity" of his statements that the firearms he had purchased were manufactured in Guatemala. That contention is contradicted by the record. The government's expert witness testified, based on design, appearance, and markings, that the weapons were produced in the Soviet Union (IV Tr. 223-225). In addition, he testified that he had never heard of a "Guatemalan Model 1938" until petitioner's trial and that to his knowledge no arms were ever manufactured in Guatemala (*id.* at 231). Petitioner's own expert witness acknowledged on cross-examination that none of the firearms in question had been manufactured in Guatemala, and that he, too, had never heard of a "Guatemalan Model 1938" or of any manufacture of guns in Guatemala (III Tr. 109). Several witnesses testified that petitioner himself referred to the firearms as "Russian" (I Tr. 28, 29-30, 91-95; see also *id.* at 185). That evidence, viewed in the light most favorable to the government (see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942)), was clearly sufficient to prove the falsity of petitioner's statements that the firearms were manufactured in Guatemala.

No. 82-2069

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROGER ALAN COX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

INTRODUCTION

The principle issue presented by this case is whether a conviction can rest upon alleged misstatements, where the issue of the objective falsity of

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REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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is determined by Congress when they passed the law. They set a maximum sentence that may be imposed in any case. The Judge, under the law, is permitted to impose anything from a term of probation or a fine up to the maximum term of imprisonment that Congress has set. In other words, it's all a matter of human judgment on the part of the Judge just as in the instance of determining guilt or innocence it is a matter of human judgment on the part of a jury and of course, in performing the responsibility that is yours, which is to determine guilt or innocence, you Ladies and Gentlemen are vitally concerned that your verdict speak the truth.

APPENDIX

(Excerpt from Jury instructions, IV Tr. 286-288)

Now you Ladies and Gentlemen are not concerned with the possible consequences of your verdict, and of course, by possible consequences, I mean possible punishment. Under the laws passed by Congress which created this Court and which assigned to you Ladies and Gentlemen the duty of determining guilt or innocence, the duty of determining [sic] what sentence is to be imposed on any person who is convicted either by a jury or by his plea of guilty, is given to the Judge of the Court. Now, even though that is not your responsibility, by your questions you have indicated some interest in how the Court goes about performing its duty. Let me explain to you, generally speaking, in every instance in which any person is convicted of a crime in this Court or any similar United States Court, that would be because he pled guilty or was convicted by jury, there is a set procedure by which the Court goes about performing its duty. We don't do that without hearing the facts the same as the jury does not determine guilt or innocence without hearing the facts. We get our facts from an investigation by our probation officer. He talks to the defendant, writes down whatever the defendant wishes to say to the Court, he then goes about investigating the background of the defendant from the day he is born up until the present time and he writes it all up in a typewritten report and gives the defendant and his lawyer a copy of it, gives a copy to the Judge and we then assemble in the Courtroom whenever that is all accomplished and hear from the defendant and his lawyer and anybody else that they want to bring with them as to what sentence should be imposed and it is only at that moment the Judge makes a judgment as to what the sentence should be. The range of sentence that may be imposed by the Court

The court of appeals properly held (id. at A19-A20) that, although "no reference to sentencing whatsoever" is the preferable practice, the reference to sentencing in this case did not deprive petitioner of a fair trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

AUGUST 1983

DOJ-1983-08

Finally, Section 5848(b) expressly provides that the exclusionary rule of subsection (a) does not apply to a prosecution "under any applicable provision of law with respect to the furnishing of false information." The illegality of the importation at issue involved the fraudulent obtaining of permission to import based on false statements. Thus, as the court of appeals concluded (Pet. App. A23), "[t]he importation violation [under 18 U.S.C. 545] is clearly 'with respect to' a prosecution for furnishing false information."[10]

5. Petitioner's final contention (Pet. 45-50) is that his convictions should be reversed because, in response to questions from the jury, the trial court made a reference to sentencing in its jury instructions.[11] That contention does not warrant review. As the court of appeals explained (Pet. App. A19):

> [T]he judge's reference to sentencing concerned the range of potential punishment, without referring to a specific maximum other than that delineated by Congress. The judge in no way intimated what punishment he might be inclined to give. He also consistently informed the jury that potential punishment was not their concern; they were only to look for the truth and provide a verdict according to what the evidence demonstrated.

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[10]Petitioner contends (Pet. 45) that the court of appeals' analysis allows him to "stand convicted of making false statements to bring the guns into the United States and * * * for [importing the guns] by making the same false statements," in violation of the Double Jeopardy Clause. That contention is without merit. The statutes involved are distinct and require different elements of proof. See Brown v. Ohio, 432 U.S. 161, 166 (1977).

[11]The instructions in question (IV Tr. 286-288) are included as an appendix to this brief in opposition.

violated the "exclusionary rule" set forth in 26 U.S.C. 5848.[8] That contention is without merit.

We note initially that petitioner's contention has no relation to the nine false statement counts and that his sentence does not meaningfully depend on his convictions for the violations of 18 U.S.C. 545. Moreover, the exclusionary rule of Section 5848(a) only prevented the government from using the documents in question against petitioner "in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the [documents]" (emphasis added).[9] As charged in the indictment, petitioner's violation of the smuggling statute (18 U.S.C. 545) did not occur until some time after he submitted the false applications for permits to import the guns. Accordingly, the government's use of those documents in connection with the smuggling charges was not barred by Section 5848.

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[8]Section 5848 provides:

(a) General rule. - No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence.

(b) Furnishing false information. - Subsection (a) of this section shall not preclude the use of any such information or evidence in a prosecution or other action under any applicable provision of law with respect to the furnishing of false information.

[9]As petitioner notes (Pet. 40-41), Section 5848(a) was enacted to eliminate the self-incrimination problems presented by the firearms reporting regulations. The Self-Incrimination Clause does not protect declarations relating to future crimes. See United States v. Apfelbaum, 445 U.S. 115, 129-130 (1980).

the disposition of those applications.[6] Indeed, petitioner, an experienced arms dealer, expressly recognized that "the guns would have to be called Guatemalan in order to allow them to be imported * * * into the U.S." (I Tr. 95).[7]

Thus, the materiality of petitioner's statements was clearly established, and there is no reason to believe that any other court of appeals would have granted petitioner the relief he seeks. To whatever extent a conflict may exist concerning whether materiality is a question of law to be decided by the court, the present case does not provide an appropriate occasion for this Court to address it.

4. Petitioner contends (Pet. 40-45) that use of his false applications to show that guns were imported "fraudulently" and "contrary to law," in violation of 18 U.S.C. 545,

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[6]For the same reason, petitioner's false statements concerning the country in which the guns were manufactured made on his "Application(s) for Tax-exempt Transfer of Firearm and Registration to Special (Occupational) Taxpayer" (Counts 6 through 8) (see 27 C.F.R. 179.88), were capable of influencing the government and thus were material.

[7]Petitioner's argument (Pet. 36) that there could be no finding of materiality because there was "no evidence of any reliance" on his statements is frivolous. The settled rule is that " '[a] material false statement * * * is one that is capable of affecting or influencing * * * a government function' " and "the fact that it did not actually influence the Government is immaterial." United States v. Lichenstein, 610 F.2d 1272, at 1274-1275 (quoting United States v. Lichenstein, 610 F.2d 1272, 1277-1278 (5th Cir.), cert. denied, 447 U.S. 907 (1980); emphasis in original). In any event, petitioner's false statements actually influenced the disposition of his import applications, since he received permission to import the weapons. Cf. United States v. Poorbaugh, 593 F.2d 346, 350 (8th Cir.), cert. denied, 441 U.S. 936 (1979) (defendant who applied for and received illegal payments is not in a position to assert that his false statement was not material on the ground that it was incapable of producing illegal payments).

Petitioner cites no case, and we are aware of none, in which a court has overturned a conviction under 18 U.S.C. 1001 on the ground that the issue of materiality was not submitted to the jury. The Ninth Circuit has held in two cases that the trial court erred in itself deciding the question of materiality rather than submitting it to the jury, but in both cases it affirmed the convictions because it was clear that the statements at issue were material. See United States v. Valdez, supra, 594 F.2d at 728-729; United States v. Eaxi, 416 F.2d 351, 354-355 (9th Cir. 1969). The Tenth Circuit has not addressed the question whether a trial court commits reversible error by deciding the question of materiality. See United States v. Irwin, supra, 654 F.2d at 677 n.8, and cases cited therein; United States v. Wolf, 645 F.2d 23, 25 (10th Cir. 1981).

Contrary to petitioner's claim (Pet. 35-37), there can be no doubt that his false statements on applications to import firearms were material, *i.e.*, that they "had a 'natural tendency to influence, or [were] capable of affecting or influencing, a governmental function.' " United States v. Diaz, 690 F.2d 1352, 1357 (11th Cir. 1982), quoting United States v. Markham, 537 F.2d 187, 196 (5th Cir. 1976), cert. denied, 429 U.S. 1041 (1977). Treasury and State Department regulations require arms dealers to submit an application for a permit to import firearms or ammunition into the United States. 27 C.F.R. 178.112(b); 22 C.F.R. 123.02. A dealer must identify the country in which the firearms were manufactured on the application. 27 C.F.R. 178.112(b). Applications for permits to import regulated firearms originating in communist-bloc countries will be disapproved. 27 C.F.R. 47.52(a); 22 C.F.R. 126.01. Thus, petitioner's misrepresentation that the submachine guns were manufactured in Guatemala was "capable of affecting or influencing"

1983).[4] However, he suggests that the better rule is found in the Ninth and Tenth Circuits, which have approved the practice of submitting the question of materiality to the jury. See, e.g., United States v. Irwin, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Valdez, 594 F.2d 725, 729 (9th Cir. 1979). This Court recently denied certiorari in a case presenting the same contention. Isenberg v. United States, No. 82-967 (May 16, 1983).[5] Review of the issue is likewise unwarranted in this case.

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[4]The great weight of authority among the circuits is consistent with the view that materiality is a question of law to be decided by the court in a prosecution for violation of 18 U.S.C. 1001. See, e.g., United States v. Abadi, 706 F.2d 178, 180 (6th Cir. 1983), cert. pending, No. 82-1954 (filed June 2, 1983); United States v. Richmond, 700 F.2d 1183, 1188 (8th Cir. 1983); United States v. McInnosh, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); United States v. Bernard, 384 F.2d 915, 916 (2d Cir. 1967); United States v. Ivey, 322 F.2d 523, 529 (4th Cir.), cert. denied, 375 U.S. 953 (1963); United States v. Clancy, 276 F.2d 617, 635 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961); Weinstock v. United States, 231 F.2d 699, 703 (D.C. Cir. 1956). See also 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 28.09 (3d ed. 1977 & Supp. 1980).

This Court has recognized that the materiality of false statements generally is a question for the court. In Sinclair v. United States, 279 U.S. 263, 298 (1929), construing the pertinency requirement of a statute prescribing refusal to answer questions by congressional committees, the Court stated:

> The question of pertinency * * * was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. * * * And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.

[5]The same issue is also raised in Abadi v. United States, No. 82-1954 (filed June 2, 1983), now pending before the Court.

out (Pet. App. A14), petitioner's argument "confuses the subjective standard given by the court, for the element of knowingly, with the objective element of falsity in fact." In fact, as the court further noted (id. at A13-A14), "the record [shows that] the [trial] court went to great lengths to explain the subjective standard of 'knowingly' so as to demonstrate to the jury the difference between this element and the element of 'falsity in fact.' " Considered in the context of the instructions as a whole, the supplemental instruction could not have suggested to the jury that the falsity of petitioner's statements was not an element of the offense.

3. Petitioner further contends (Pet. 35-40) that the trial court erred in not submitting the issue of materiality to the jury and that there was insufficient evidence of the materiality of his false statements. We note at the outset that petitioner did not raise these contentions in the court of appeals.[3] Absent exceptional circumstances not present in this case, this Court will not review an argument that was not raised in the courts below. See United States v. Lovasco, 431 U.S. 783, 788 n.7 (1977); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970); Lawn v. United States, 355 U.S. 339, 362-363 n.16 (1958). In any event, petitioner's contentions are without merit.

Petitioner acknowledges (Pet. 38) that the rule in the Eleventh Circuit and in a number of other circuits is that materiality is a question of law to be decided by the court in a prosecution for violation of 18 U.S.C. 1001. See, e.g., United States v. Fern, 696 F.2d 1269, 1274 (11th Cir.

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[3]Petitioner states (Pet. 18, 35) that he contended in the court of appeals that there was a failure of proof on the issue of materiality. However, that argument does not appear in his court of appeals brief and was not addressed in the court's thorough opinion. Petitioner does not contend that he challenged in the court of appeals the trial court's failure to submit the issue of materiality to the jury.

2. Petitioner's related contention (Pet. 30-35) that the trial court instructed the jury that it did not have to find that his statements were in fact false is also insubstantial. Petitioner concedes (Pet. 30) that the trial court correctly told the jury several times that "[a] statement is false [within the meaning of Section 1001] *if it was untrue when made* and was then known to be untrue by the person making it or causing it to be made" (Pet. App. A11-A12; emphasis added). But he contends (Pet. 32-34) that the trial court's supplemental instruction to the jury[2] was in effect an instruction that the sole issue for its consideration was petitioner's subjective belief that his statements were false, not whether they were in fact false. However, that supplemental instruction was directed to the issue of knowledge, not the issue of actual falsity. As the court of appeals pointed

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[2]The supplemental instruction was given in response to the jury's question about the meaning of the phrase "when in truth and fact" petitioner knew he was referring to guns manufactured in the Soviet Union, contained in the indictment. The instruction provided in part (IV Tr. 319-320):

> Now, the way that an indictment is prepared doesn't track the exact language of the statute. It includes language that's not in the statute. To the extent that the indictment does, that language is what we call surplusage, it's unnecessary. There's nothing in that statute that says "in truth and fact." So that language is just extra. That's the reason it wasn't explained to you before. The question, if you want to boil that down to common sense language, it's just telling you in legal mumbo-jumbo, you might appropriately call it, that when Roger Alan Cox signed that form, it alleges that he then knew that as to his knowledge the guns in question were not made or manufactured in Guatemala. We're looking at what he believed at the time, not what anybody else believed. We're not here determining after the fact, the truth of the origin of those weapons. We're not here in a gun case. We're here determining what Roger Cox believed the place of manufacture of those guns was when he filled out that form. If he did not believe them to really be made in Guatemala and he put it on the form, then that obviously would be a falsity; would be something that he knew at the time in question.

to the making of the false statements, and to claim that the statutory bar is thus inapplicable, as the Government does here. The acts were parts of an indivisible continuum, and the statutory bar must apply.

CONCLUSION

For all of the reasons stated herein and in petitioner's main submission, petitioner respectfully prays that the Court grant his petition.

Respectfully submitted,

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argument. He argues that 26 U.S.C. §5848 applies only to violations of law occurring prior to or concurrently with the filing of the documents and that the smuggling charge occurred "after" the submission of the allegedly false applications. This argument would render the statutory bar a nullity.

Forms completed in connection with the importation of firearms are one step in the importation process; one completes those forms only to import the firearms. The smuggling charge here was premised entirely on the importation of weapons based on allegedly false statements in those forms. Under these circumstances, it is senseless to separate the making false statements charge from the smuggling charge, to argue that the smuggling offense occurred subsequent

rehearing in the Court of Appeals, petitioner's first point was titled "Materiality and Specific Intent."

Only the conflict in the Circuits was not raised below. Because the Eleventh Circuit has uniformly adopted the position that materiality is a question of law for the court while the Ninth and Tenth Circuits adopt a different rule, it is for this Court to resolve the conflict, not for the Eleventh Circuit.

In this regard the Government's reference to several recent cases which have also raised the issue of the conflict in the Circuits reconfirms the need for the grant of the writ of certiorari to resolve the conflict.

Finally, on the question of the statutory bar, the Solicitor General makes an interesting but unacceptable

misstated the claim as one involving petitioner's belief and it addressed that issue. Again, even if petitioner believed the guns were of Soviet origin that is insufficient for a conviction. The issue must still be presented to the jury as to whether in fact the statement was false. The Court of Appeals never addressed this issue.

Third, contrary to the Solicitor General's argument, the issue of materiality was raised below. Petitioner's first point on appeal argued that "The importation of the firearms in question was not unlawful." (pp. 12-17). Although not phrased in terms of materiality, in essence this was an argument concerning the materiality of the alleged false statement. In his petition for

Second, the issue is not whether there was or was not sufficient evidence to prove either that the guns were manufactured in the Soviet Union or even that the guns were not manufactured in Guatemala. Similarly, the issue is not the sufficiency of evidence as to petitioner's belief in where the guns were manufactured. Rather, the issue is whether a conviction can stand where falsity in fact, an essential element of the crime, is not presented to the jury. The supplemental charge to the jury quoted by the Solicitor General (p. 4) is a clear statement by the trial court that the issue of falsity in fact was not before the jury. In addition, reliance on the Court of Appeals' decision in this context is most inappropriate. The Court of Appeals

smuggling large quantities of submachine guns which he knew were manufactured in the Soviet Union into the United States. The actual facts were quite different. Petitioner purchased five 45-year-old collector machine guns which were imported, not from the Soviet Union, but from Guatemala.

The Solicitor General further makes it appear as if it was conceded that petitioner, a gun dealer, knew the machine guns were of Russian origin. Again the testimony is clear that the machine guns were of Russian design. Therefore, petitioner's calling them Russian was not a reference to place of manufacture (copies of weapons designs are manufactured in many countries), but to the type of weapon.

Immediately after the supplemental instruction was given the jury returned a verdict of guilty.

The impropriety of predicating a conviction solely upon petitioner's belief, existing the need to prove objective falsity, was exacerbated here by the fact that petitioner was precluded from showing at trial that it was difficult to know the place of manufacture because the CIA, as part of a clandestine operation in Guatemala, had introduced "remanufactured" weapons with intentionally misleading markings.

ARGUMENT

The Solicitor General's brief in opposition is misleading in a number of material respects. First, it creates the impression that petitioner was a major transgressor of the foreign policy of the United States by

the statements was withdrawn from the jury. The Government claimed that petitioner's statement that certain guns were manufactured in Guatemala was a misstatement because in truth and fact the guns were manufactured in the Soviet Union. At trial, the Government was unable to prove the place of manufacture. The trial court thereupon instructed the jury in a supplemental instruction that the place of manufacture was not an issue in the case. Rather, according to the trial court, the only issue was petitioner's belief.

> "We're not here determining after the fact, the truth of the origin of those weapons. We're not here in a gun case. We're here determining what Roger Cox believed the place of manufacture of these guns was when he filled out that form."